IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-738**

JOETHELIA PALMER,

*Petitioner,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, A BODY POLITIC AND CORPORATE, JOSEPH P. HANNON, RAYMOND C. PRINCIPE, GERALD J. HEING, BESSIE F. LAWRENCE, NINA F. JONES, JAMES G. MOFFAT, AND FLORENCE H. PASKIND,

*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion in this cause of the United States Court of Appeals for the Seventh Circuit correctly stated the law as enunciated in prior decisions of this Court and other courts. The judgment and opinion are not in conflict with any decision of any other Court of Appeals.

## QUESTIONS PRESENTED.

1. Does the first amendment protect written refusal of a public school teacher to teach curricular exercises her principal has ordered her to teach?

2. Before discharging a probationary kindergarten teacher, must a board of education conduct an adversary hearing for the teacher to oppose discharge for unprotected refusal to obey superiors?

## STATEMENT OF FACTS.

Petitioner's Statement of Facts is inaccurate and replete with argument. Respondents therefore deem it necessary to set forth this additional statement of facts.

On December 21, 1977 Petitioner was served with notice from Dr. Joseph P. Hannon, General Superintendent of Schools, that her services as a probationary teacher would be terminated December 23, 1977 due to her refusal to comply with the prescribed curriculum. Pending the trial court's ruling on petitioner's motion for a temporary restraining order and respondents' motion for summary judgment, the Board of Education deferred taking action on the discharge. The trial court entered judgment for respondents finding, *inter alia,* that petitioner's curricular non-conformity is not protected by the first amendment, even assuming that pledge recital is not a curricular exercise and assuming that her refusal to lead the class in the pledge was protected. (Petitioner's A7, A8) Following entry of the trial court's judgment, Dr. Hannon and his staff reconsidered the matter and drafted a report different than that of December 21, 1977. The subsequent report, board report 79-59-14, was presented by Dr. Hannon to the Board of Education of the City of Chicago on March 28, 1979. It was that report upon which the board de-



liberated when it discharged petitioner. Said report does not mention objections of petitioner to the Pledge of Allegiance or the anthem as reasons for discharge, but reports only the other matters of curricular non-conformity which the trial court found to be independent justification for dismissal. Following dissolution on April 6, 1979 of a prior injunction, petitioner was notified on April 9, 1979 not to report for work thereafter.

Petitioner inaccurately states as fact that the Court of Appeals held that the letter from the principal to petitioner was sufficient to constitute a valid policy statement absent the existence of any specific curriculum or policy directing petitioner to teach the kinds of subjects about which respondents complained. The Court of Appeals observed that the curriculum is found in Board of Education policy and the directives of petitioner's principal and superiors. (Petitioner's A 12) The record contains the philosophy, methods and scope of curriculum in Chicago Public Schools. (R. Vol. II, Doc. 16) Petitioner earlier conceded the existence of Board Rules granting principals rule making power and obliging teachers to obey principals. (R. Vol. II Doc. 7, pp. 2-3, 5) Petitioner now inaccurately states that respondents have been unable to identify any specific rule, regulation or policy that she has violated.

## REASONS FOR DENYING THE WRIT.

### I.

### CURRICULAR NON-CONFORMITY IN THE CLASSROOM IS NOT PROTECTED BY THE FIRST AMENDMENT.

The courts in the various circuits have consistently held that refusal to conform classroom teaching content to the curriculum is not protected. *Clark* v. *Holmes,* 474 F. 2d 928 (7th Cir. 1972) *cert. denied* 93 S. Ct. 2148, 411 U. S. 972, 36 L. Ed. 695 (1973); *Ahern* v. *Board of Ed.,* 456 F. 2d 399 (8th Cir. 1972); *Adams* v. *Campbell County,* 511 F. 2d 1242 (10th

Cir. 1975). The decision rendered herein by the Court of Appeals for the Seventh Circuit is in accord with the law and is consistent with prior decisions by other courts of appeal. While it is true that the United States Supreme Court has never decided whether the scope of the first amendment protection includes curricular non-conformity, two prior cases imply that such non-conformity is not protected: *Biklen* v. *Board of Education,* 333 F. Supp. 902 (N. D. N. Y. 1971) *aff'd,* 406 U. S. 951, 32 L. Ed. 2d 340, 92 S. Ct. 2060 (1972) and *Epperson* v. *Arkansas,* 393 U. S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968).

In *Biklen* v. *Board of Education,* the Supreme Court affirmed a New York District Court's judgment sustaining a compulsory written loyalty oath as a precondition to employment of a teacher notwithstanding her religious belief that one should not make such an oath. The District Court found the requirement invulnerable to first amendment attack either on free speech or free exercise grounds. The District Court noticed the oath had withstood attack on free speech grounds in other cases and reasoned that those authorities controlled the free exercise assertion as well. The Supreme Court affirmed the finding of the District Court that the requirement was invulnerable to first amendment attack either on free speech or free exercise grounds. The oath was like the pledge. It did not require a promise not to associate or require disclaimer of any activity outside school. It was an oath of allegiance. The trial court found the interest of the state in assuring allegiance of teachers to both the National and State Constitutions to be compelling.

In the only case cited by petitioner dealing with curriculum other than pledge recital or singing of the National Anthem the plaintiff in that case did not address the issue of teacher nonconformity but instead attacked a curriculum statute itself. *Epperson* v. *Arkansas,* 393 U. S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266. No issue of disobedience to superiors existed. Indeed, in *Epperson* the biology books designated by the school board



for use by Ms. Epperson contained a chapter violative of the statute in question. To avoid the conflict between statute and prescribed books, Ms. Epperson sought declaratory relief in state court. The Supreme Court declared unconstitutional the misdemeanor criminal law in question. The rationale is an unconstitutional attempt by the legislature to establish one religious view. In notes 15 to 17 of the opinion the Court presents the legislative and political history of the statute during 1928 to demonstrate the intent to establish one religious viewpoint. And note 18 indicates that the state agreed in its brief that the legislature had such factors in mind. In fact, the record showed that the state had not even once attempted to enforce the act and likely never would. Justice Black doubted existence of a real controversy justiciable by his Court and referred to the state's defense as apologetic, 393 U. S. at 109, 21 L. Ed. 2d 237.

In his concurring opinion (393 U. S. 115-16; 21 L. Ed. 2d 240-41), Justice Harlan accurately states the rationale of his brothers as, not free speech of the teacher, but unlawful establishmentarian intent of the legislature:

> "I concur in so much of the Court's opinion as holds that the Arkansas statute constitutes an 'establishment of religion' forbidden to the States by the Fourteenth Amendment. I do not understand, however, why the Court finds it necessary to explore at length appellants' contentions that the statute is unconstitutionally vague and that it interferes with free speech, only to conclude that these issues need not be decided in this case. In the process of not deciding them, the Court obscures its otherwise straightforward holding, and opens its opinion to possible implications from which I am constrained to disassociate myself."

The next to last paragraph of the opinion of the Court itself demonstrates that Justice Harlan is correct when he says that the only rationale is the establishment clause. The opinion there notes the clear intent of the 1928 Tenn. legislature to establish one well-defined, sectarian religious view point (biblical funda-

mentalism) and to disestablish others. The orders the principal in this case gave to petitioner implement secular law and humanistic tradition. The District Court and the Court of Appeals correctly held that petitioner is not free under the first amendment to disregard the prescribed curriculum because of her claim that curricular conformity would conflict with her religious principles.

## II.

## PETITIONER WAS NOT DENIED DUE PROCESS OF LAW.

Petitioner alleges that she was deprived of due process by virtue of her dismissal without prior notice and a hearing. However, petitioner, as a non-tenured teacher, has no entitlement under state law to continued employment. Petitioner's allegation essentially is that of a deprivation of a liberty interest; however, there is no allegation of any untrue, derogatory publication by respondents about her which stigmatized her or caused her to suffer actual loss of opportunities to find other employment.[1] The crux of petitioner's claim to infringement of a liberty interest is her assertion that the Respondents' requirement of curricular conformity deprived her of free religious expression or free exercise of religion. This purported substantive right to disregard prescribed curriculum because of her claim that it conflicts with her religious principles is one that the trial court found does not exist.

While the fourteenth amendment forbids the state to deprive a person of interests in life, liberty or property without due process of law, the protected interests are "not created" by that amendment but rather, "they are created and their dimensions are defined" by an independent source such as state

1. These are the necessary elements defined by case law emanating from dicta concerning employment liberty in *Roth* v. *Regents*, 408 U. S. 564, 92 S. Ct. 2701 (1972), cited by petitioner. See *Codd* v. *Velger*, 429 U. S. 624, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977) and *Colaizzi* v. *Walker*, 542 F. 2d 969 (7 Cir., 1976).



substantive statutes or rules or a substantive guarantee of another part of the U. S. Constitution. *Board of Regents* v. *Roth*, 408 U. S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Due process rights support and protect categories of substantive rights emanating not from the due process clause but from other sources. This is the teaching of *Bd. of Regents* v. *Roth*. Where no substantive right to a benefit exists, then its termination without hearing is no denial of due process. *Colaizzi* v. *Walker*, 542 F. 2d 969 (7 Cir., 1976), *cert. denied* 430 U. S. 960 (1977). The issue in this case is a substantive one, namely, first amendment substantive protection or not of the written refusal of petitioner to obey the principal of Field School. The case of petitioner fails on the merits of that substantive issue. The complete failure of her substantive case destroys as well any claim of denial of due process of law.

Plaintiff argues that the due process clause required an adversary proceeding before her dismissal notwithstanding the presence or absence of an underlying substantive claim but such an argument makes the due process clause a mechanical thing. Plaintiff uses the phrases "due process" and "without hearing" rhetorically and not analytically. Uncritical, polemical quotation of those phrases does not advance reason or justice. The due process clause is not a slogan or a self-executing truism.

## CONCLUSION.

When the principal of Field School ordered the probationary kindergarten teacher to prepare and conduct holiday exercises and lessons for the infants in that class and to teach and lead them in attendant song and dance, she sought to develop in those boys and girls traits of appreciativeness and an understanding of the ethos of many peoples. The written order of the principal of Field School implemented state law and fundamental Board of Education policies and advanced the humanistic tradition of education in the West. Petitioner's written refusal to obey that order was insubordination not protected by the first amendment. For that reason the Board of Education of the City of Chicago discharged petitioner, but only after elaborate experiments to accommodate plaintiff. None of these efforts were required.

Because these facts were admitted by petitioner, the United States District Court and the United States Court of Appeals for the Seventh Circuit adjudged for respondents and against petitioner. The rulings of those courts are in accordance with law as enunciated in prior decisions of this Court and they do not conflict with any decision of any other court of appeals.

We respectfully submit that based on the above authorities and for the reasons discussed the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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